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IN THE

Supreme Court of the United States

October Term, 1945

No. 1052 77

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. DICKINSON

No. [redacted] 78

UNITED STATES OF AMERICA, PETITIONER

v.

F. H. WITHROW

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAMPBELL, MCCLINTIC & JAMES
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ERNEST K. JAMES
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THE CHARLESTON PRINTING COMPANY, CHARLESTON, WEST VIRGINIA

INDEX

Page

I. STATEMENT 3

II. SPECIFICATIONS OR ERRORS 5

III. REASONS FOR REFUSING THE WRIT 6

1. *The lower court correctly held that each respondent is entitled to recover the damages to the residue of his tract of land, above that permanently or intermittently flooded, caused by and which are the proximate result of the taking of the part appropriated or the use thereof for the purpose taken, and which damages include erosion due to saturation and softening of the soil and wave action thereon, or the reasonable cost of protective measures necessary to prevent such erosion or damage if timely installed* 7

2. *The lower court correctly awarded compensation for Dickinson's lands permanently submerged, but later reclaimed at his own expense* 9

3. *There was ample evidence to support the lower court's finding of a partial taking by intermittent flooding of lands lying between elevations 566 and 574 feet* 11

4. *The lower court correctly held that the causes of action accrued on September 22nd, 1938* 14

5. *The Government took respondents' property more than seven years ago and during the three years of this litigation the Government has had two trials on the law and on the facts* 18

IV. CONCLUSION 19

CITATIONS

Page

Cases:

Bduman v. *Ross*, 167 U. S. 548 ..... 7, 10

Campbell v. *United States*, 266 U. S. 368 ..... 7, 10

Columbia Haley Dooner v. *United States*, 95 C. Cs. 392 ..... 15, 16

Robert Y. Creech v. *United States*, 102 C. Cs. 301 14

Daitz Flying Corp. v. *United States*, 4 F.R.D. 372 11

High Bridge Lumber Co. v. *United States*, 69 Fed. 320 (1895) 9

Kelley's Creek and N. W. R. Co. v. *United States*, 100 C. Cs. 396, (1943) 9, 10

Manigault v. *Springs*, 199 U. S. 473 (1905) 9

Marion-County Court v. *United States*, 53 C. Cs. 120 ..... 15, 16

Mills v. *United States*, 46 Fed. 728 ..... 8, 9

Peabody v. *United States*, 231 U. S. 530 16

Portsmouth Co. v. *United States*, 250 U. S. 1 16

Pumpelly v. *Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557 7

Southern Pacific Co. v. *United States*, 58 C. Cs. 428 8

United States v. *Chicago B. & Q. R. Co.*, 8 Cir., 82 Fed. (2d) 131, Certiorari denied, 298 U. S. 689 ..... 7, 9

United States v. *Chicago B. & Q. R. Co.*, 7 Cir. 90 Fed. (2d) 161 ..... 7, 9

United States v. *Cress*, 243 U. S. 316 ..... 7, 9, 19

United States v. *General Motors Corp.*, 323 U. S. 373 ..... 7, 10, 19

United States v. *Grizzard*, 219 U. S. 180 ..... 7, 9, 10, 19

United States v. *Sponenbarger*, 308 U. S. 256 ..... 13, 14

United States v. *Welch*, 217 U. S. 333 ..... 7, 9, 19

United States v. *Willow River Power Co.*, 324 U. S. 499 8

Statutes and Texts:

25 Stat. 94, 33 U.S.C.A. 591 13

20 American Jurisprudence 478 12

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I. STATEMENT

Petitioner's "Statement" omits some important facts and contains others that are either immaterial or inaccurately stated. Petitioner asserts that by May 30th, 1937, the dam was "capable of being operated as it is today" (Pet. 4). The meaning of the quoted language is not clear. The dam had been in operation several months before its construction was complete but, of

course, it was only partial operation. The trial court found that the dam was completed, inspected and officially accepted by the Federal Government on August 20th, 1937 (R. 40).

Petitioner states that the Government objected to a valuation of the lands as of September 22nd, 1938, (the date on which the land was completely submerged) instead as of May, 1937 (Pet. 6-7). At the trial the Government contended for valuations as of October 21st, 1936. Its witnesses, however, valued the lands as of September 22nd, 1938, and later testified that there was no material difference in the valuations as of October 21st, 1936, and the valuations as of September 22nd, 1938 (R. 239, 240, 244).

Petitioner states that in the case of Dickinson all of the 0.22 acre, except 0.05 acre, "had been reclaimed and *will not be* submerged", suggesting that only 0.05 acre was ever submerged (Pet. 7). The 0.22 acre of land was completely submerged on September 22nd, 1938 (R. 40). Dickinson's protective measures to guard against further erosion and damage, and which served to reclaim a part of his land, were not installed until 1940 (R. 41).

During the latter raises in the stage of the Kanawha River and following the attainment of the new pool stage, the erosion and damage to Dickinson's property was quite considerable. Between 5,000 and 7,000 cubic yards of the river bank broke off and slipped into the river. Approximately thirty shade trees, ranging from six to eighteen inches in diamater, were destroyed, and a large crack developed in the earth above the top of the river bank extending through the foundation of Dickin-

son's residence, doing substantial damage thereto. The erosion and damage to Withrow's property was equally as great. The trial court found that in each case the erosion and damage was the direct and proximate result of the permanent flooding of the part appropriated (R. 41-43).

Respondents proceeded on the theory that their claims, with respect to damages to the residue, are limited to the reasonable costs of installing appropriate protective measures which would have been adequate to protect the properties against such damage, if timely installed, and provided such cost is less than the amount of the total damages if permitted to go unchecked. Several qualified witnesses testified that, in view of the value of respondents' properties and the nature and extent of the erosion and damages, it would have been sound economy to expend much more for protection than the sums allowed by the District Court (R. 118, 122, 159, 163, 167, and 169). That evidence stands uncontradicted.

II. SPECIFICATIONS OF ERRORS

Petitioner assigns six errors (Pet. 11), whereas under "Questions Presented" they appear to be reduced to four propositions (Pet. 2). The fourth specification of error is described as a subordinate question to be discussed and briefed only should certiorari be granted (Pet. 3, footnote 2). The sixth specification of error is that the court below erred "in affirming the judgments of the District Court" (Pet. 11). This mere generality is not explained in the petition, nor in any way connected with the errors assigned in the Court of Appeals.

III. REASONS FOR REFUSING THE WRIT.

To emphasize the importance of these cases to the Government, Petitioner suggests that an affirmance of the lower court would mean that the Government must pay $10.33 per lineal foot as the cost of similar protection on each side of the Kanawha River for the entire length (30 mi.) of the Winfield pool (Pet. 12). Petitioner would influence this Court by inferences from facts not in the record and not warranted by any facts outside of this record. The twenty-five or more similar suits pending in the District Court represent all claims, most of them very small, on which the Government could now be held liable in connection with the Winfield Dam. All other claims are barred by the statute of limitations. The navigation pools created by London, Marmet and Winfield Dams extend a distance of at least sixty miles. The War Department has declined to acquire by condemnation any flowage easements on either side of the Kanawha River, except on the non-navigable tributaries. The Government has purchased only such easements as it could acquire at its own price. Most of these were acquired early, before the riparian owners realized the loss or damage entailed. The property owners have been compelled to accept rather nominal sums for such flowage easements or else sue their Government. They were not accustomed to litigation, many of them did not have the benefit of counsel, and in any event many were reluctant to sue their Government. If the claim exceeded the sum of $10,000.00 it was necessary to prosecute the suit in the Court of Claims at Washington. The result has been that a vast majority of the property owners did not sue and their claims are now lost.

V. The lower court correctly held that each respondent is entitled to recover the damages to the residue of his tract of land, above that permanently or intermittently flooded, caused by and which are the proximate result of the taking of the part appropriated or the use thereof for the purpose taken, and which damages include erosion due to saturation and softening of the soil and wave action thereon, or the reasonable cost of protective measures necessary to prevent such erosion or damage if timely installed.

The Court of Appeals is abundantly supported by the following authorities: *Pumpelly v. Green Bay Co.*, 13 Wall., 166, 20 L. Ed. 557; *Bauman v. Ross*, 167 U. S. 548; *United States v. Welch*, 217 U. S. 333; *United States v. Grizzard*, 219 U. S. 180; *United States v. Cress*, 243 U. S. 316; *Campbell v. United States*, 266 U. S. 368; *United States v. General Motors Corporation*, 323 U. S. 373; *United States v. Chicago B. & Q. R. Co.*, 8 Cir., 82 Fed. (2d) 131, Certiorari denied, 298 U. S. 689; and *United States v. Chicago B. & Q. R. Co.*, 7 Cir., 90 Fed. (2d) 161.

Petitioner cites (Pet. 14-15) the same line of authorities relied upon before the Court of Appeals (R. 257 Note 3). The Court of Appeals correctly noted their inapplicability in pointing out:

> "But these decisions do not touch the specific point upon which the land owners here rely, for in none of them was there a permanent submersion and an acknowledged taking of any part of the land such as has occurred in the cases now before the court. The land owners rest their case in this respect on another line of authority which holds that when part of an owner's land is completely taken, he is entitled not only to compensation therefor but also to compensation for any damage occasioned to his remaining land." (R. 257).

Petitioner relies particularly on *Mills v. United States*, 46 Fed. 738; *Southern Pacific Co. v. United States*, 58 C. Cs. 428; and *United States v. Willow River Power Co.*, 324 U. S. 499. None of these cases involved the flooding or taking of fast lands. In the *Mills* case (747) the court said:

> "It must be observed, with relation to the claim of damage caused by the overflow of the plaintiffs' lands during the freshets, that they do not stand in the attitude of land owners above mean or high water level. Their lands are reclamations, as appears from the declaration, which would be covered, not only by ordinary high water, but by the ordinary flow of tide."

In the *Southern Pacific Co.* case, the Government had constructed a jetty, which merely shifted ocean currents and deflected them with greater force against the plaintiff's property. The court said:

> "What was done was done in the exercise of a right, and the consequences are incidental, and no liability is incurred."

In the *Willow River Power Company* case, Mr. Justice Jackson, speaking for the Court, was careful to point out that the case did not involve the taking of any fast lands. He said:

> "There is no finding that any fast lands were flooded or that other injury was done to property, or that claimant otherwise was deprived of any use of his property. It is true that the water level was above high water mark on the St. Croix River banks and on claimants' structures, but damage to land as land or to structures as such is not shown to be more than nominal and accounts for no part of the award." (711).

Petitioner also relies on *High Bridge Lumber Co. v. United States*, 69 Fed. 320 (1895) and *Manigault v. Springs*, 199 U. S. 473 (1905). These two cases and the *Mills* case were unsuccessfully urged upon this Court, in support of a similar contention, thirty-six years ago in *United States v. Welch*, 217 U. S. 333 (See argument for United States 333-335). Again the same three cases were unsuccessfully urged upon this Court, in support of similar contentions, twenty-nine years ago, in the leading case of *United States v. Cress*, 243 U. S. 316 (See brief for United States, printed in 61 L. Ed. at 747). Again the same three cases were unsuccessfully urged upon this Court ten years ago in the Government's petition for writ of certiorari in *United States v. Chicago B. & Q. R. Co.*, (See pp. 6-9 of petition filed on May 11, 1936). It is significant that Petitioner does not mention the *Welch* case or the *Cress* case or the *Chicago B. & Q. R. Co.*, case. We submit that if there is any difficulty in reconciling the *High Bridge Lumber Co.* case with the subsequent decisions of this Court, that is no ground for certiorari in this case. Mr. Justice Lurton wrote the opinion in the *Grizzard* case in 1911, sixteen years after he (as Circuit Judge) had written the opinion in the *High Bridge Lumber Co.* case. It is the *Grizzard* case upon which the Court of Appeals relied.

2. The lower court correctly awarded compensation for Dickinson's lands permanently submerged, but later reclaimed at his own expense.

Petioner cites the case of *Kelley's Creek and N. W. R. Co. v. United States*, 100 C. Cs. 396 (1943) as authority for the contention that there can be no recovery for land w[redacted]s been reclaimed, etc. In that case, Judge

Whitaker, speaking for the court on the motion for a new trial, expressed dissatisfaction with the "strange result" reached, but held:

> "Plaintiffs could have protected its lands which were actually flooded, but they chose not to do so. For these they can recover; but they cannot recover for lands which would have been overflowed, but which were not in fact, because plaintiffs spent money to keep them from being."

Dickinson's lands were actually flooded and remained completely submerged for some two years, so he would be entitled to full recovery even under the *Kelley's Creek* decision. However, the basic soundness of the decision in other respects may well be questioned. Judge Whitaker failed to recognize the distinction between the situation where there is no taking or physical invasion but mere consequential damages, and the case where there is an actual taking of a part of the tract and damages to the residue. This distinction has been clearly pointed out by this Court in the *Bauman*, *Grizzard*, *Campbell* and *General Motors Corp.* cases. The Court of Appeals did not regard its decision as directly contrary to the *Kelley's Creek* case, but merely stated:

> "We disagree with the holding in that case insofar as it may be thought to lead to the conclusion that Dickinson was not entitled to be paid for the value of the entire acreage completely taken on September 26, 1938." (R. 260).

As the Court of Appeals points out (R. 260), when this land was completely submerged on September 22nd, 1938, the land was taken under an implied contract on the part of the United States to pay for it, and the Government was not relieved from this obligation by the

mere fact that the land owner, with its approval, subsequently recovered a part of the acreage at his own expense.

The record in this case also precludes Petitioner's contention. The Government's formal answer to the complaint filed in the District Court, paragraph V thereof (R. 4), specifically admits that Dickinson's land was flooded up to elevation 566 feet, and that "said flooding has covered 0.22 acre of the land described in paragraph 2 of the complaint." Further, by the pre-trial order made and entered in this cause on July 1st, 1943 (R. 7), counsel for the Government stipulate and agree that the present normal pool stage in said river at Dickinson's property is 11.35 feet above the normal pool stage of Old Lock and Dam No. 7, and that "0.22 acre of the lands described in the complaint is permanently submerged thereby;". That a litigant is bound by formal admissions in his answer needs no citation of authority. Were there no such admissions in the answer, the agreement of facts as set forth in the pre-trial order would be sufficient to preclude the Government. *Daitz Flying Corp. v. United States*, 4 F. R. D. 372.

3. There was ample evidence to support the lower court's finding of a partial taking by intermittent flooding of the lands lying between elevations 566 and 574 feet.

Agents of the Government on several occasions sought to purchase from respondents flowage easements covering the area lying between elevations 566 and 574 feet, representing that it would be flooded occasionally in connection with the operation of the dam (R. 69-70). The map prepared by the Government's engineers and fur-

nished to Dickinson during such negotiations included the area lying between elevations 566 and 574 feet. (Dickinson Exhibit No. 2, R. 54). The letters to Dickinson from Major Frech, U. S. engineer at the Huntington office, stated that the Government desired said easement area, and explained that it would be needed in connection with the operation of the Winfield Dam. (Dickinson Exhibits Nos. 14 and 15, R. 61-62). On motion of the Government, the trial court disregarded most of this evidence on the ground that Dickinson was not able to furnish the names of the agents or prove their authority to bind the Government, and on the ground that the letters were written during a period of negotiations between the parties in an effort to compromise the claim. Respondent preserved his exceptions to this ruling of the trial court (R. 14). It was not denied that these same agents were the persons who did acquire for the Government numerous other flowage easements up and down the Kanawha River within the Winfield pool, and it will appear from said letters that there was no dispute between the parties as to the area of the flowage easement desired or the purposes for which such area would be used. The evidence was proper for the purposes offered. 20 Am. Jur. 478.

During the trial the Government stipulated on the record that in acquiring by condemnation other flowage easements within the Winfield pool, but on non-navigable tributaries, it had in every case acquired easements above elevation 566 feet (normal pool), ranging from three feet at the dam to eight feet or elevation 574 feet at respondents' properties (R. 173). One of Petitioner's counsel testified that in each and every one of these condemnation suits, the Government alleged in its petition that the easement area above normal pool would be

flooded occasionally (R. 173). In response to a question by the court as to why the Government needed a flowage easement up to elevation 574 feet, when normal pool was at elevation 566 feet, the Government's own witness stated:

> "Well, in this eight-foot area of water, the stage of the river *will rise and fall due to the manipulation of the dam.* Above 574 we have no control over the river and the water will rise to the same elevation as it did before the construction of the dam." (R. 200).

Despite all this evidence, Petitioner insists that respondents' lands lying between elevations 566 and 574 feet have not been subject to intermittent flooding, and that the Government does not need and will not use any such flowage easements in the operation of the Winfield Dam. The Secretary of War is authorized to acquire, by condemnation or by purchase, only such lands and flowage easements as may be "needed to enable him to maintain, operate and prosecute works for the improvement of rivers and harbors for which provision has been made by law." 25 Stat. 94, 33 U. S. C. A., 591. Admittedly the Petitioner has expended Federal funds for the acquisition of many other easements to flood intermittently the area between elevations 566 and 574 feet. Unless those flowage easements were needed in connection with the Winfield Dam, the Secretary of War had no authority to acquire them. It would be a strange situation if the Secretary of War could justify his acts by claim of necessity in the case of voluntary acquisitions, and deny such necessity or use where suit is brought under the Tucker Act.

Petitioner is mistaken in contending (Pet. 17) that the decision of the lower court is in conflict with *United*

States v. Sponenbarger, 308 U. S. 256, and *Robert Y. Creech v. United States*, 102 C. Cs. 301. In neither case was there any intermittent flooding of fast lands. In the *Sponenbarger* case the court found (266) that the Government had not subjected the land to any additional flooding, above what would occur if the Government had not acted. In the *Creech* case the court found that the levy had no effect on the height of the waters of the lake or on wind tides over and above the elevations which normally would have been occasioned under the same weather conditions without the levy.

4. The lower court correctly held that the causes of action accrued on September 22nd, 1938.

The Winfield Dam is a large structure and its construction required a considerable period of time. It was capable of partial use before its construction was complete. Petitioner's assertion that the construction of the dam was complete by May 30th, 1937, is not supported by the evidence. True, one of Petitioner's witnesses testified (R. 178) that on May 30th, 1937, the dam was "capable of being operated as it is today", but we submit that at best this testimony is ambiguous. The finding of the District Court, based on all the evidence, that the dam was not completed until August 20th, 1937, should be accepted (R. 40).

Petitioner argues (Pet. 19, footnote 8) that the date of August 20th, 1937, has no relation to the physical facts, and is important only to determine when the job was completed as between the Government and the contractor. We are not aware of any valid distinction between the meaning of the word, 'complete', as used in construction contracts and its proper use in this pro-

ceeding. Moreover, it may be helpful to bear in mind that on August 20th, 1937, the employees of the Government were not concerned with a defense to claims or suits by riparian property owners. Their finding on that date as to when the dam was complete is entitled to more weight. We do not mean to suggest that the date of completion fixes the time when the cause of action accrued in these cases, but for such importance as it may have, we submit that August 20th, 1937, must be accepted as the date on which the dam was completed.

Petitioner is mistaken in the assertion that, as regards the date of taking, the decision below is contrary to *Court of Marion County, West Virginia v. United States*, 53 C. Cs. 120, and *Columbia Haley Dooner v. United States*, 95 C. Cs. 392. In the *Marion County* case the court held that the cause of action accrued "when Dam 14 was completed and put in operation by the filling of the pool." Petitioner quotes some language from a concurring opinion by Judge Campbell to the effect that when a dam is built and the pool begins to fill "*should* fix the time of the taking" (Pet. 20); but Judge Campbell in the concluding paragraph of his opinion says: "When the water had reached pool level, the taking so far as there was any, was complete." It is also clear from the opinion in the *Dooner* case that the court regarded the cause of action as having accrued when the land was permanently submerged. The court said:

> "On January 16th, 1933, the defendant raised the level of the water and permanently submerged plaintiffs' land. * * * Since plaintiffs' property was taken on January 16th, 1933, it is necessary, in order to give just compensation for the taking,

that they be awarded interest from that date * * *." (399-400).

Petitioner contends that, under the court's special finding of fact in the *Dooner* case, the cause of action accrued when the lock and dam were closed, rather than when the land was flooded. Certainly that construction is not consistent with the language of the opinion, but even so it would avail Petitioner nothing. The complete closing of the roller gates of the Winfield Dam which caused the final rise in the pool, could not have occurred earlier than a few days before September 22nd, 1938.

Petitioner contends that in the cases at bar the lower court could not consistently hold that respondents' causes of action as to the land permanently submerged did not accrue until the lands were completely flooded, and allow in the same action a recovery for the lands thereafter to be intermittently flooded. That question was dealt with in the *Marion County* case. There the Court of Claims was concerned primarily with the question as to when the cause of action accrued with respect to the roads intermittently flooded. Both sides admitted that the cause of action with respect to the roads completely submerged was barred by the statute of limitations. The Court held that since the same governmental act was declared upon as to all the roads, both those flooded at pool level and those not so flooded but subject to more frequent overflow, the cause of action as to both accrued at the same time, namely, "when Dam 14 was completed and put in operation by the filling of the pool." (150).

The Court of Appeals correctly distinguishes the cases of *Peabody v. United States*, 231 U. S. 530, and *Portsmouth Co. v. United States*, 250 U. S. 1. (R. 256).

There the intention of the Government to use the land of a private owner as a suitable field over which to fire heavy guns installed for the purpose, may constitute a taking; but it is obvious that in such a situation, the existence of the intention itself deprived the owner of the use of his land.

We agree with Petitioner that in cases of this kind the date on which the cause of action accrues is important in that it determines the time from which interest is computed, the date of valuation, and frequently the identity of the claimant. We insist, however, that the decision of the lower court is correct in principle and in accord with the holdings of other courts generally. Where the Government floods thousands of small properties, as it has in the case of the London, Marmet and Winfield Dams, refusing to condemn but leaving the property owners to their rights under the Tucker Act, what better event could be selected to determine those questions than the date when the properties are actually submerged. Small property owners have no familiarity with engineering plans. Notices giving descriptions by mere elevations related to mean sea level are unintelligible and rarely inform them what lands are involved. Frequently the extent of the damages to the residue of the tract cannot be determined before the actual flooding. Even a completion of the physical structure thirty miles down stream supplies no better information. Petitioner would have the rights of property owners determined by such events as the trimming of shrubbery off of the river banks, notices to those holding permits for sewer lines and other structures in the river, or completion of the dam structure to the point where some employee of the corps of engineers will testify that it can operate the same as when completed. Events such as these are too indefinite.

Contrary to Petitioner's suggestion (Pet. 22, note 10), it is well known that the Secretary of War, through the Chief of Engineers, has and frequently exercises the authority to revise, within limitations, the authorized plans of a navigation project. The elevation of the dam or roller gates may be varied without going back to Congress.

5. The Government took respondents' property more than seven years ago and during the three years of this litigation the Government has had two trials on the law and on the facts.

The respondents are citizens of very modest means. In each case the property involved is the owner's home and represents the greater part of his life's savings. It has been more than seven years since the Government flooded and appropriated their properties. Nothing has been paid them and their efforts to collect have resulted only in further expenditure of large sums in litigation. The awards for protective work will not in any sense make the respondents whole. In addition to the hardship and expense of carying on this litigation from one court to the next, Dickinson has already expended, to prevent further damage and probable destruction of his home, more than three times the amount of the lower court's award for protective work. The government has had two hearings on the law and the facts. The government lawyers have repeatedly asserted that just compensation in the case of Dickinson is limited to the value of the unreclaimed part of the 0.22 acre permanently flooded (approx. $100.00); and in the case of Withrow limited to the value of the 0.11 acre permanently flooded ($200.00). This misconception has been repudiated by all of the Judges in these cases. (District Judge Moore, and Circuit Judges Soper, Cole-

man and Barksdale). And necessarily so, otherwise, as this Court said in the *General Motors Corporation* case:

> "the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing 'just compensation' into some such concept as the common law idea of a peppercorn in the law of seizin or the later one of 'value received' in that of contractual consideration." 323 U. S. 378.

IV. CONCLUSION

The rulings of the lower court are not in conflict with the decisions cited by Petitioner. The law applicable to the fundamental questions in these cases was settled by this Court at least thirty years ago in the *Welch*, *Grizzard* and *Cress* cases, and recently re-affirmed in the *General Motors Corporation* case. We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

CAMPBELL, McCLINTIC & JAMES
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April, 1946.